No. 15-927

Supreme Court, U.S.
FILED
JUL 22 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SCA HYGIENE PRODUCTS AKTIEBOLAG
AND SCA PERSONAL CARE, INC.,

Petitioners,

v.

FIRST QUALITY BABY PRODUCTS, LLC,
FIRST QUALITY HYGIENIC, INC.,
FIRST QUALITY PRODUCTS, INC., AND
FIRST QUALITY RETAIL SERVICES, LLC,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICI CURIAE ALLIANCE OF INVENTOR GROUPS IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are non-profit organizations of inventors and small-business owners with first-hand experience with America's patent system. They have spent substantial portions of their lives working to ensure that the flaws in that system are addressed in a manner that preserves those features that have made it one of the driving forces of the world's most powerful economy.

Amici's extensive experience with the patent system and its ties to the health of the American economy make them well situated to explain the importance of the issues presented in this case. Amici and their members know from personal experience the difficulties that patentees sometimes face in asserting their patent rights, and how, if the Federal Circuit's decision is left standing, patentees may be unnecessarily deprived of damages for past infringement of their patent rights.

Amici are:

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[1] Counsel for all parties received notice of *amici curiae*'s intent to file this brief 21 days before its due date. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

The American Society of Inventors is the country's oldest continuously active, inventor-help organization.

The Alliance of U.S. Startups and Inventors for Jobs is a nonprofit group of inventors, startup companies, and research institutions that educates and advocates for federal legislation that facilitates inventions and provides strong patent rights.

The National Innovation Association is a nonprofit association of inventors, makers, entrepreneurs and startups that provides networking, information and connections to buyers, manufacturers, prototypers, and other professionals.

US Inventor, Inc. is a nonprofit education and advocacy organization with approximately 8,000 members that advocates for strong patent rights in Washington D.C. and across the country.

The Independent Inventors of America is a nonprofit organization that provides educational resources to inventors.

The Inventors Association of South Central Kansas, The Edison Innovators Association, the Inventors Network of Minnesota, The Texas Inventors Association, and The San Diego Inventors Forum are local, nonprofit inventor organizations that provide direct support, education, networking, and other opportunities to independent inventors and patent-centric startups.

The Young Inventors Association of America, Inc. is a nonprofit organization that supports young inventors by helping them secure funding through a public/private partnership, as well as hosting the annual "young inventors showcase."

SUMMARY OF THE ARGUMENT

In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), this Court held that laches may not bar copyright claims for legal relief brought within the statutory time limit for seeking that relief. The Court noted in *Petrella* that the Federal Circuit allows laches to bar legal relief for patent claims brought within the six-year statutory time limit for seeking that relief, (*id.* at 1974 n. 15), but the Court did not resolve whether this application of laches comports with this Court's precedent or the Patent Act. In the decision being appealed, a closely-divided Federal Circuit refused to extend the reasoning of *Petrella* to patent cases, leaving in place its judicially-created, patent-specific rules for laches. However, nothing in the Patent Act warrants a deviation from the accepted common law principles set forth in *Petrella*, which apply to all federal statutory limitation periods, not just the one set forth in the Copyright Act. The Federal Circuit's decision improperly second guesses Congress' judgment about when a patentee may timely seek legal relief, and thus violates the separation of powers.

Moreover, applying laches to curtail Congress' six-year limitations period undermines the protections afforded to inventors and the incentive to foster innovation mandated by the U.S. CONST art I, § 8. Specifically, the patent laws were designed first and foremost to protect inventors and to foster innovation by granting an exclusive property right in exchange for public disclosure of inventions. Given

marketplace realities, continuing to impose an additional laches limitation on small companies and individual inventors will in many instances inhibit or even foreclose their ability to recover damages for infringement, thereby diminishing the incentives for public disclosure through patent protection. Congress has wisely and unambiguously provided patentees with a reasonable time period to exercise their rights, and the courts should not disturb Congress' judgment.

ARGUMENT

I.
APPLYING LACHES TO PATENT LEGAL CLAIMS VIOLATES THE SEPARATION OF POWERS

As this Court made clear in *Petrella*, courts should not use judicially-created laches to second guess Congress' judgment in setting a reasonable period to assert legal claims for damages. As in *Petrella*, here Congress has prescribed a specific period of time to assert a legal claim for damages. Specifically, in the Patent Act, Congress has set a six-year time limit for recovering damages prior to the filing a complaint for legal relief. 35 U.S.C. § 286 (2016). Neither the Patent Act nor its legislative history suggests that laches can be used to shorten this six-year period.

Although the majority of the Federal Circuit held that laches could be applied to bar legal claims because Congress codified laches as a defense in Patent Act, the operative section on which the majority relied – Section 282 – does not even mention laches. 35 U.S.C. § 282 (2016). The majority principally relied upon a lone statement in a USPTO report created two years *after* enactment of Section 282 in 1952, to hold that the section implicitly incorporates laches as a defense. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1322-23 (Fed. Cir. 2015). That *post-hoc* report is not legislative history and does not demonstrate that Congress intended to specifically codify laches as a defense that could

trump the clear limitations period of Section 286. *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex. rel. Wilson*, 559 U.S. 280, 297-98 (2010) (letter exchanged between Congressman and Senator did "not qualify as legislative 'history,' given that it was written 13 years after the amendments were enacted.")

Further, as the dissent of the Federal Circuit noted, "even if laches were implicit in § 282, that would not be enough, for the question is whether Congress prescribed a variant form of laches in the Patent Act that applies to claims for legal relief" as opposed to just equitable relief. *SCA Hygiene Prods. Aktiebolag*, 807 F.3d at 1335. Before and after the time Section 282 was enacted in 1952, this Court has recognized that laches may bar only equitable forms of relief. *See, e.g.*, *Petrella*, 134 S. Ct. at 1973 (*citing Holmberg v. Armbrecht*, 327 U.S. 392, 395-96 (1946)); *Merck & Co. v. Reynolds*, 559 U.S. 633, 652 (2010). Thus, to the extent that a common law defense of laches is codified in the Patent Act, it could apply to bar only equitable relief, and would not affect the timeliness of claims for legal relief governed by Section 286. *See La. Pub. Serv. Comm'n v. Fed. Commc'n Comm'n*, 476 U.S. 355, 370 (1986) (noting that in performing statutory construction "provisions of a statute should be read so as not to create a conflict.")

In holding otherwise, the majority of the Federal Circuit relied upon laches decisions by lower courts in patent cases. *See SCA Hygiene Prods. Aktiebolag*, 807 F.3d at 1326-27. However, these lower-court

decisions cannot alter the generally-applicable common law of laches set forth by this Court. Indeed, this Court has repeatedly admonished against deviating from accepted common law principles in the patent context absent an express statutory justification for such a deviation. *See e.g.*, *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-40 (2015); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1758 (2014); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). And, as this Court has repeatedly noted, "a major departure from the long tradition of equity practice should not be lightly implied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982); *accord eBay Inc.*, 547 U.S. at 395 (concurring). Nothing cited by the majority of the Federal Circuit nor anything in the Patent Act justifies a departure from the traditional common law principles of laches, which may bar only equitable relief and not legal relief.

Without an explicit statutory basis for laches or clear Congressional intent to deviate from accepted common law principles of laches, courts should simply apply the straight-forward time limit of Section 286. Indeed, Section 286 was enacted to provide a uniform time period for seeking damages for past infringement. Before the predecessor to Section 286 was enacted, the Patent Act (as with the Copyright Act) did not contain a limitations period. To prevent patent owners from bringing claims after an unreasonable delay, courts borrowed laches periods from analogous state-law causes of action. However, these laches periods varied from state-to-

state. Accordingly, in 1896, Congress adopted a uniform limitations period of six years. *SCA Hygiene Prods. Aktiebolag*, 807 F.3d at 1336 (referencing H. REP. NO. 54-940 at 2 (1896)); *see also Petrella*, 134 S. Ct. at 1975. As a result, Congress filled the hole previously filled by laches.

By enacting a limitations period, Congress manifested its judgment as to a reasonable period of time within which to pursue recovery of damages for patent infringement, effectively building into the statute its own laches determination. As discussed *infra*, Congress' determination that six years is a reasonable period speaks to the complexities of patent litigation. Because Congress has addressed when a claim will be considered timely, a judicially-created laches period is unnecessary. *Petrella*, 134 S. Ct. at 1974 ("The expansive role for laches MGM envisions careens away from understandings, past and present, of the essentially gap-filling, not legislative-overriding, office of laches."); *SCA Hygiene Prods. Aktiebolag*, 807 F.3d at 1336; *see also Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.") The six-year limitations period of Section 286 already represents Congress' judgment about what constitutes a timely claim. The Federal Circuit's

decision unnecessarily upsets this judgment, and thus violates the separation of powers.

II.
APPLYING LACHES TO PATENT LEGAL CLAIMS FRUSTRATES THE POLICY IN FAVOR OF PROTECTING INVENTORS AND PROMOTING INNOVATION

The Federal Circuit, with a passing reference to protecting innocent defendants, suggests that public policy supports its refusal to apply *Petrella* to patent cases. *SCA Hygiene Prods. Aktiebolag*, 807 F.3d at 1330. But, public policy in the patent context fully supports adhering to the six-year limitations period, which reflects Congress' judgment regarding a fair balance between the interests of defendants, who may or may not be innocent, and those of patentees, including inventors and small companies, who may well require at least that long to be in a position to enforce their legitimate patent rights. Truncating this six-year period by applying laches can harm the legitimate inventors the Patent Act was designed to protect, and thereby undermine the Constitutional mandate to promote the useful arts.

A. The Importance of Individual Inventors and a Patent System that Protects Them

Inventors are the lifeblood of American innovation. They are the primary reason for our Constitutional mandate to promote the useful arts. U.S. CONST art. I, § 8 Simply put, these inventors are working to improve society and create new endeavors. *See*

Christopher A. Cotropia, *The Individual Inventor Motif in the Age of the Patent Troll*, 12 YALE L.J. & TECH. 52, 55 (2009). Founding Fathers Benjamin Franklin and Thomas Jefferson were inventors in their own right, so perhaps it is not surprising that the Constitution itself seeks to protect inventors and inventions through patents. *See discussion generally*, Congr. Dana Rohrabacher, *Congressional Commentaries: The Case for a Strong Patent System*, 8 HARV. J.L. & TECH. 263, 270 (1995).

The small businesses created by these inventors have become a foundation for growth of the U.S. economy. Michael Meurer, *Inventors, Entrepreneurs, and Intellectual Property Law*, 45 HOUS. L. REV. 1201, 1202-03, n.7 (2008); Rohrabacher, 8 HARV. J.L. & TECH. at 266 ("The American system is based on awarding broad protection to the rightful creator and encouraging and providing a means to make the strongest possible application that can be defended against infringers. United States public policy regards patents not as trophies, but as a means for the creation of new industries and jobs.")

Recognizing their importance, Congress has passed numerous measures to foster growth of small businesses, including the Small Business Act of 1953, 15 U.S.C. § 631 et seq. (2016 (providing for government backed loans to small businesses) and the Small Business Jobs Act of 2010, 26 U.S.C. § 38 (2016) (providing certain tax incentives to small businesses); *see also* 15 U.S.C. § 638(d)(1)(E) (2016) (providing joint program with small business concerns to prosecute patents). Consistent with its

Constitutional purpose, the United States patent system also includes numerous measures to protect inventors and their small businesses. *See e.g.*, Cotropia, 12 YALE J.L. & TECH at 58 *citing* U.S. CONST, art. I, § 8 (naming *inventors* specifically for protection); 35 U.S.C. § 116 (2016) (awarding patents to named *inventors*). Numerous provisions of the Patent Act aim to provide protections to inventors, particularly the small and independent inventors. *See e.g.*, *Meurer*, 45 HOUS. L. REV. at 1205 (noting that the Patent Act has maintained the one-year grace period to file patent applications under 35 U.S.C. § 102(b) to benefit small inventors) (particularly relevant in view of the America Invents Act's switch to a first-to-file system); 35 U.S.C. § 297 (2016) (provisions to protect small inventors from invention promoters); 35 U.S.C. § 122(b)(2)(B) (2016) (the American Inventor's Protection Act of 1999 added a provision to opt out of the patent application publication requirement if a patentee agrees not to seek foreign counterparts); *see also* Mark D. Janis, *Patent Abolitionism*, 17 BERKELEY TECH. L.J. 899, 920 n.86 (2002) (discussing patent reform measures in 1990s and legislative history discussing impact of reforms and need to protect small inventors).

Similarly, the USPTO has enacted regulations providing disparate and favorable treatment to small and independent inventors. *See, e.g.*, 37 C.F.R. § 1.27 (2016) (providing reduction in fees to small entities); 37 C.F.R. § 1.28 (2016) (providing refunds to small entities based on certain errors); *see also* 35 U.S.C. § 41(h) (2016) (providing reductions in certain patent fees to qualified small entities).

This Court has in the past instructed courts to consider the interests of small inventors. *See, e.g.*, *eBay Inc.*, 547 U.S. at 393 (noting that self-made inventors may satisfy the four-prong analysis and rejecting a categorical rule that might deny them an injunction). Yet, in refusing to apply *Petrella* to patent cases, the Federal Circuit failed altogether to consider the effect its ruling would have on small inventors, and thus failed to account for the fact that Congress had good reasons to allow patentees to recover damages for infringement going back a full six years.

B. Policy Considerations Do Not Justify the Federal Circuit's Failure to Apply *Petrella* to Patent Cases

The majority of the Federal Circuit suggested that patent cases differ from copyright cases such that there is a greater need to use laches in patent cases. *SCA Hygiene Prods. Aktiebolag*, 807 F.3d at 1330. More specifically, the majority reasoned that laches is more important in patent cases because, unlike in copyright cases, there is no innocent infringer defense in patent cases, making patent infringers less culpable, and more deserving of laches protection, than copyright defendants. This policy argument fails for several reasons.

To begin with, as the dissent in the Federal Circuit correctly noted, the fundamental policy that *Petrella* supports is that of the separation of powers, which applies universally, including in the patent context. *SCA Hygiene Prods. Aktiebolag*, 807 F.3d at 1334. It

is just as improper to apply a judicially-created laches defense to shorten a congressionally-selected limitations period in the Patent Act as it was in the Copyright Act.

Moreover, much of what the Federal Circuit majority considered to be patent-specific reasons for allowing laches to bar legal claims was in fact addressed, and rejected, by this Court in *Petrella*. The majority opinion cautioned that defendants in patent cases could face lawsuits years after they independently create an infringing product, thereby allowing a plaintiff to recover royalties based on six particularly profitable years. *SCA Hygiene Prods. Aktiebolag*, 807 F.3d at 1330. But, as *Petrella* noted, there is nothing wrong with allowing a claim to ripen such that only cases that become "worth the candle" are actually litigated. *Petrella*, 134 S. Ct. at 1976. The alternative, adopted by the Federal Circuit, forces patentees to file suit early and often, or risk losing any potential ability to enforce their rights, based on a judge's after-the-fact evaluation of the "reasonableness" of the delay in bringing suit. Such a policy tends to proliferate litigation that may not otherwise be worth the investment and burden on the parties and the court system. Moreover, the majority's concern about delayed lawsuits is far less acute in the case of patents than copyrights, because patents expire decades earlier than copyrights, necessarily shortening the window of time within which a patent defendant may be subject to liability.

Another flaw in the Federal Circuit majority's policy analysis is that it focused solely on the potential

impact of laches on patent defendants, ignoring plaintiff patentees altogether. The Court should consider any policy implications from all perspectives, a point addressed solely by the Federal Circuit dissent. *SCA Hygiene Prods. Aktiebolag*, 807 F.3d at 1342 (recognizing that there may be good reasons for delay in patent cases). When considering the nature of patent assertions from the plaintiff patentee's viewpoint, the differences between copyright and patent suits provide a stronger policy case against the application of laches in patent cases than in the copyright context addressed in *Petrella*.

The differences in bringing a patent suit versus a copyright suit are significant. Most copyright claims can be ascertained without the need for prolonged analysis prior to bringing suit. In contrast, patent suits require construing the patent claims in view of the patent specification and prosecution history in the USPTO, and applying the claims to the potentially infringing products to determine whether there is a basis to allege infringement. This highly technical evaluation can require a substantial amount of resources, time and money, depending upon the nature of the technology. And, due to a lack of resources, many small inventors must undertake this analysis without the benefit of outside expert help, which lengthens the amount of time needed. In addition, the recent changes to the Federal Rules of Civil Procedure eliminated the model patent infringement complaint in Form 18, which means that a patentee who seeks to bring a lawsuit for infringement must prepare a sufficiently detailed complaint that complies with the pleading

requirements set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In sum, patentees need a reasonable period of time to investigate infringement and prepare sufficiently detailed complaints. All of this justifies Congress' decision to provide a six-year limitations period.

Moreover, given the marketplace realities, applying laches may foreclose many small and independent inventors from ever asserting their patent rights. It may not be feasible for small and independent inventors to file suit at the first sign of infringement. Many small and independent inventors lack the resources to constantly monitor the marketplace as readily as larger corporations with in-house or outside intellectual property counsel. Meurer, 45 HOUS. L. REV. at 1234. Moreover, without the in-house counsel that many larger corporations have to support them, small and independent inventors are often at a disadvantage in negotiating potential licenses to avoid litigation. *Id.*

Further, small and independent inventors typically cannot self-fund patent litigation. The average cost of patent litigation through trial (where the amount in controversy is greater than $1 million) ranges between $2.2 million to $6.3 million. *See* American Intellectual Property Law Association, *2015 Report of the Economic Survey* ("AIPLA Report") at I-106-108 (2015). Another layer of cost has arisen with the recent enactment of the new *inter partes* review (IPR) procedure before the Patent Trial and Appeal Board. *See generally In re Cuozzo*, 136 S. Ct. 2131

(2016). The average cost of an *inter partes* review proceeding through appeal is $469,000. AIPLA Report at I-144. The aforementioned costs do not include the upfront expenses that may be incurred by hiring counsel to investigate and prepare pre-filing correspondence with potential infringers, and any expenses incurred to negotiate a settlement.[2] Small and independent inventors often do not have the liquid assets necessary to fund a litigation at the first sign of potential infringement. Meurer, 45 HOUS. L. REV at 1233-34. In many cases, these small and independent firms have limited funds from investors or grants, which are dedicated exclusively to product and market development. Even where the companies have discretion regarding the use of funds, given their limited resources they may be forced to make a Hobson's Choice to either continue product development but not assert their patent rights or shift the company's focus to litigation but

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[2] Also, many district courts have patent-specific local rules that require the patentee to serve detailed patent infringement contentions, including claim charts, in the early stages of litigation. *See e.g.*, U.S. District Court for the Northern District of California, Patent L.R. 3-1 (requiring detailed disclosure of infringement contentions 14 days after Initial Case Management Conference). Further, patent lawsuits usually require technical and economic experts, whose services substantially increase the cost of litigation. Similarly, the new *inter partes* review procedure will often require the patent owner to retain a technical expert.

delay their product development.[3] This can have the perverse and unintended effect of turning companies that have no desire to immediately litigate their patents into patent assertion entities, where the only business of the company effectively becomes patent assertion.

Given these high expenses, many small and independent inventors need to secure alternative financing in order to assert their patent rights. This may entail retaining counsel on a contingency-fee basis or otherwise securing financing to fund a litigation in exchange for a share of the potential recovery. However, both of these options necessarily shift the emphasis of pre-suit investigation from a substantive merits analysis to a cost/benefit analysis.

As with any financing arrangement, the financier will need to assess risk and the potential for return on investment prior to agreeing to take on the risk of funding a litigation. *See, e.g.*, Steven Susser, *Contingency and Referral Fees for Business Disputes a Primer*, MICH. BAR. J. at 37 (Nov. 2011). However, to do so, they will typically require an evaluation of

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[3] As a result, by applying laches courts may create a disincentive for independent and small inventors to seek patent protection out of fear they will not be able to enforce their rights in a timely manner. To discourage inventors from seeking patent protection in this manner undermines the constitutional mandate of promoting the useful arts.

the size of the market and some history of sales of the potential defendant to analyze the potential recovery. In many cases where the sales of the infringer are small at first (*e.g.*, if the infringer is itself a startup or if it takes time to penetrate the market), it may require waiting for years of sales to satisfy a litigation financier that the potential for recovery is worth the investment. *Petrella*, 134 S. Ct. at 1976 ("And there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work ... Even if an infringement is harmful, the harm may be too small to justify the cost of litigation.")

Applying a laches clock that starts when the patentee knew or should have known of the potential infringement in these circumstances can effectively foreclose entirely a patentee's ability to enforce its patent rights, even against the most willful of infringers. Congress provided patentees six years to claim for past damages. When considering the current practical difficulties faced by an independent or small patentee who discovers an infringement, this period of time is eminently reasonable, and should not be curtailed through the application of laches.

C. Recent Changes in the Law Make It More Important than Ever to Allow Independent Inventors Six Years to Recover Damages for Patent Infringement

Recent reforms to the Patent Act and recent judicial precedent, while intended to protect defendants from perceived abuses of the patent system, including by so-called patent trolls, have made it even harder for small inventors to enforce their patent rights. For example, the new *inter partes* review (IPR) procedure permits prior art challenges to the validity of patents under Sections 102 and 103 of the Patent Act. *See* 35 U.S.C. § 311 (2016).[4] Where an infringement lawsuit is pending, an instituted IPR often will prolong the litigation because many lawsuits are stayed pending the outcome of IPR proceedings even where the patentee contests the stay motion. *See* Matt Cutler, *3 Years Of IPR: A Look At The Stats*, LAW360 (Oct. 9, 2015) *available at* http://www.law360.com/articles/699867/print?section=ip. The IPR procedure provides a relatively

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[4] The Patent Act now also provides for post-grant review ("PGR") of patents within nine months of the issuance of the patent. A petitioner may challenge the validity of a patent in a PGR proceeding under any ground set forth in Section 282(b)(2) or (3) of the Patent Act. *See* 35 U.S.C. § 321 (2016). Under the same authority and Section 18 of the AIA, another post-grant review now exists for similar challenges to "covered business method" patents.

streamlined process for defendants to challenge the validity of a patent, and its use has become very popular. *See* http://www.uspto.gov/sites/default/files/documents/2016-01-31%20PTAB.pdf (showing an increasing number of IPR petitions and that the USPTO institutes the vast majority of petitions). Moreover, patent claims challenged in an IPR petition have had an average effective survival rate of only 51%. Cutler at 3. While arguably effective at invalidating patents, IPRs have also added another layer of time and cost to enforcing those patents that survive the IPR, and have increased the risk for inventors and investors who support enforcement efforts.

As a result, the use of the IPR procedure can hinder small inventors from promptly asserting their patent rights. When a patent is subject to an IPR proceeding brought by one accused infringer, financiers may take a wait-and-see approach, waiting for final determination of the IPR by the USPTO and exhaustion of any appeals before agreeing to finance further litigation.

In addition, the recent changes to the Patent Act also created a stringent standard for joinder of multiple defendants in a patent suit. *See* 35 U.S.C. § 299 (2016). Thus, a patentee faced with a multitude of separate infringers now must file separate lawsuits, potentially in a several jurisdictions, eliminating efficiencies, increasing expenses, and potentially creating further delays in bringing suit against all potential infringers.

Some recent court decisions have also made it more difficult for small inventors and patent owners to obtain financing for patent enforcement. In *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) the Court adopted a flexible approach to evaluating obviousness under Section 103 of the Patent Act. However, this approach has made it more uncertain whether a court will conclude that a patented invention would have been obvious to one of ordinary skill in the art. Indeed, it was noted to this Court that such a flexible standard would make it more difficult for small inventors to secure investments given the uncertainty in ascertaining the validity of pending patent applications. *See* Brief of Altitude Capital Partners et al. as *Amici Curiae in Support of Respondents*, *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (No. 04-1350), at 4 ("Similarly, a firm like Altitude Capital Partners will be less inclined to back an independent inventor, or will do so only on much less favorable terms that diminish incentives to innovate, if Altitude cannot predict with reasonable confidence whether the inventor's patents will be upheld in court.")

Most recently, in *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014), the Court addressed patent eligibility under 35 U.S.C. § 101. In the wake of the Court's decision in *Alice*, district courts increasingly find claims to be invalid under Section 101, and the precise contours of Section 101 are being developed on a case-by-case basis. *See* Steven Callahan, *Alice: The Death of Software-Related Patents?*, ND TEX BLOG (May 1, 2015). As a result, *Alice* has affected

investment and licensing, particularly in the software field.

The practical impact of all these recent changes to the patent system on small businesses and independent inventors has been profound. Small and independent inventors looking to enforce their patent rights or to sell or license their patent assets now face tougher scrutiny due to the uncertainty surrounding the validity of their patents. Investors are less likely to invest in small businesses or to fund litigations where the risks associated from, for example, an *Alice* challenge makes it more difficult to value the patent assets. Moreover, infringers may be less likely to settle disputes and take licenses because they can mount a multi-tiered defense that may combine a prior art challenge in an IPR and an *Alice* challenge in court.

While these judicial and legislative developments have often benefited defendants and made it harder for abusive patent owners to assert their patents, it also has made it much more difficult for legitimate small inventors to enforce or license their valid and innovative patent rights. Even mainstream media outlets have recognized the problems these reforms have created for the small and independent inventors. *See, e.g., http://www.popularmechanics.com/technology/a21181/greatest-american-invention/* (accessed on July 7, 2016).

In light of the current situation facing individual or small inventors, it makes more sense than ever to straightforwardly apply Congress' six-year

limitations period, and less sense than ever to undermine these statutory protections by imposing judicially-created laches.

III.
CONCLUSION

For the foregoing reasons, Amici respectfully submit that this Court should reverse the *en banc* decision of the Federal Circuit and hold that laches cannot bar an otherwise timely claim for legal relief for patent infringement if filed within the statutory period set forth in Section 286 of the Patent Act.

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